

November 4 2009

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

1 **William K. VanCanagan**
2 DATSOPOULOS, MacDONALD & LIND, P.C.
3 201 West Main Street, Suite 201
4 Missoula, Montana 59802
5 Telephone: (406) 728 - 0810

6 **David H. Bjornson**
7 Bjornson Law Offices, P.C.
8 2809 Great Northern Loop, Suite 100
9 Missoula, Montana 59808
10 Telephone: (406) 721-8896

11 Attorneys for Defendants

FILED

NOV 04 2009

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CLERK OF THE SUPREME COURT
STATE OF MONTANA

ORIGINAL

12 MONTANA FOURTH JUDICIAL DISTRICT, MISSOULA COUNTY

13 JOSEPH T. BERLIN and
14 MARTHA M. BERLIN,

15 Plaintiff,

16 vs.

17 MAGNOLIA ENTERPRISES, LLC,
18 COLBERT P. HOWELL, BARBARA J.
19 HOWELL, NORTHWEST
20 ACCEPTANCE CORP., BARBARA
21 JEAN HOWELL AS TRUSTEE OF THE
22 REVOCABLE INTERVIVOS VIRGINIA-
23 BELL NEILSON TRUST AND DENNIS
24 DeVAR NEILSON,

25 Defendants.

Dept. No. 4
Cause No. DV-08-1552

NOTICE OF APPEAL

NOTICE is hereby given that Defendants in the above-entitled cause of
action, Magnolia Enterprises, LLC, Colbert P. Howell, Barbara J. Howell, Barbara

1 Jean Howell as Trustee of the Revocable Intervivos Virginia-Bell Neilson Trust,
2 and Dennis DeVar Neilson, hereby appeal to the Supreme Court of the State of
3 Montana from the *Opinion and Order* dated October 5, 2009, which granted
4 Plaintiffs' *Motion for Summary Judgment* seeking foreclosure of their mortgage.
5

6 DATED this 4th day of November, 2009.

7
8 DATSOPOULOS, MacDONALD & LIND, P.C.
9 Attorneys for the Howell Defendants

10
11 By:  _____
12 William K. VanCanagan, Esq.

13
14 BJORNSON LAW OFFICES, P.C.
15 Attorneys for Dennis DeVar Neilson

16
17 By:  _____
18 David H. Bjornson, Esq.

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CERTIFICATE OF SERVICE

I, the undersigned, an employee of Datsopoulos, MacDonald & Lind, P.C., hereby certify that a true and correct copy of the foregoing was distributed via First Class U.S. Mail, postage prepaid, this 4th day of November, 2009.

Brian J. Smith
Kathryn S. Mahe
GARLINGTON, LOHN & ROBINSON, PLLP
199 West Pine St.
P.O. Box 7909
Missoula MT 59807-7909
Attorneys for Plaintiffs

Richard Buley
TIPP & BULEY
Attorneys at Law
2200 Brooks
P.O. Box 3778
Missoula MT 59806-3778
Attorneys for Defendant Northwest Acceptance Corp.

David H. Bjornson
Bjornson Law Offices, P.C.
2809 Great Northern Loop, Suite 100
Missoula, MT 59801
Attorney for Defendant Dennis DeVar Neilson

By: 

1 Ed McLean, District Judge
2 Department No. 1
3 Fourth Judicial District
4 Missoula County Courthouse
5 Missoula, Montana 59802
6 Telephone: (406) 258-4771

FILED OCT 05 2009
SHIRLEY E. FAUST, CLERK
By [Signature] Deputy

7 MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

8 JOSEPH T. BERLIN and MARTHA
9 M. BERLIN,

) DEPT. 1

10 Plaintiffs,

) CAUSE NO. DV-08-1552

11 -vs-

) OPINION AND ORDER

12 MAGNOLIA ENTERPRISES, LLC.,
13 COLBERT P. HOWELL, BARBARA
14 J. HOWELL, NORTHWEST
15 ACCEPTANCE CORP., BARBARA
16 JEAN HOWELL as TRUSTEE of the
17 REVOCABLE INTERVIVOS
18 VIRGINIA-BELL NEILSON TRUST,
and DENNIS DeVAR NEILSON,

19 Defendants.

20 Pending before the Court in this foreclosure action is Plaintiffs' Motion
21 for Summary Judgment (Ct.Doc. 37). On July 1, 2009, Department 1 of this
22 Missoula County District Court accepted jurisdiction at the invitation of District
23 Judge Douglas Harkin of Department 4, because Department 1 of this Court
24 has jurisdiction over a companion case, Missoula County Cause No. DV-07-
25 567, captioned Dennis DeVar Neilson v. Barbara Jena Howell as Trustee of
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1 the Revocable Intervivos Virginia Bell Neilson Trust, Magnolia Enterprises,
2 L.L.C., and Barbara Jean Howell, individually, and Colbert Howell,

3 individually. Both cases center around a parcel of property described as:

4 Lots 3, 4 and 5 of Neilson Addition, a platted subdivision in Missoula
5 County, Montana, according to the official recorded plat thereof.

6 The companion case, Missoula County Cause No. DV-07-567, involves
7 disputes between brother, Dennis Neilson, and sister, Barbara Howell, over
8 beneficiary rights to subdivision Lots 4 and 5, and other trust assets, arising
9 from the sister's allegedly fraudulent management and wrongful personal use
10 and liquidation of the assets of the *Revocable Intervivos Virginia-Bell Neilson*
11 *Trust*, the family trust, in the years prior to and following the death of their
12 mother, Virginia, on December 30, 2006. Such alleged wrongful actions
13 include, among others, altering boundary lines, subdividing and encumbering
14 trust property, and Barbara's June 1, 2006 transfer of ownership of portions of
15 the trust property to herself, to Magnolia Enterprises, and to Barbara's
16 husband, Colbert Howell, for significantly less than fair market value and with
17 zero percent interest. The companion case was filed by Dennis Neilson on
18 April 26, 2007 against his sister, Barbara Howell (individually and as the
19 trustee of the family trust), Barbara's husband, Colbert Howell, and their
20 limited liability business entity, Magnolia Enterprises, (collectively the
21 "Magnolia defendants").
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1 A First Amended Complaint in Cause No. DV-07-567 was filed by
2 Dennis on December 3, 2007, and the Magnolia defendants filed an Answer
3 in that case on February 20, 2008. The companion case court file has since
4 languished, with no showing of any activity after February 20, 2008.

5 The instant case was filed on December 31, 2008 by Joseph and
6 Martha Berlin seeking foreclosure and public sale of the subject property
7 pursuant to a defaulted promissory note and mortgage executed between the
8 Berlins and the Magnolia defendants in the principle amount of \$350,000.00,
9 plus interest at the annual rate of 13.5 % (\$129.02 per day), and late fees,
10 costs, and attorney's fees, as provided in the promissory note. The Berlins
11 also seek a deficiency judgment against the Magnolia defendants should the
12 proceeds of the public sale of the property fail to cover the debt.
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16 In their Answer filed in this foreclosure action on April 14, 2009, the
17 Magnolia defendants entered general denials as to all of the Berlins'
18 allegations. The Magnolia defendants subsequently responded to the
19 pending Motion for Summary Judgment filed by the Berlins by admitting
20 liability for defaulting on the promissory note, acknowledging the Berlins are
21 entitled to foreclosure and public sale of the property, and asking for an
22 evidentiary hearing to determine the exact amount of damages owed by the
23 Magnolia defendants to the Berlins for unpaid principal, interest, late charges,
24 costs, and attorneys' fees.
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1 Defendant, Northwest Acceptance Corporation, holds a mortgage on
2 Lot 4 of the subdivision that is statutorily inferior to the Berlins' mortgage
3 because Northwest's mortgage was recorded on March 14, 2008, after the
4 Berlins' mortgage was recorded. MCA § 71-3-113. Northwest Acceptance
5 Corporation has failed to appear in this action and default was correctly
6 entered against Northwest Acceptance Corporation on May 5, 2009.
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8 Co-Defendant, Dennis Neilson, opposes the remedy of foreclosure of
9 the Berlins' mortgage under an estoppel defense by arguing that his sister,
10 Barbara, lacked the legal or contractual authority to subdivide or mortgage the
11 property because, under the terms of the family trust Dennis is the true and
12 rightful owner of Lot 5 and a portion of Lot 4 (formerly known as Tract 2A and
13 Portion A of Tract 1A, before the property was subdivided by Barbara on June
14 3, 2004, apparently without Dennis' or their mother Virginia's authorization
15 some 2½ years before Virginia's passing). Dennis relies on Article III, Nelson
16 Trust entitled "Specific Bequests" which states:
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20 1. Upon the death of the Trustor [the Mother, Virginia], the Trustee [the
21 sister, Barbara] shall distribute and pay over to Dennis DeVar Neilson
22 ("Dennis") [the brother] all farm machinery, farm equipment, farm
23 irrigation systems, 1976 Cadillac, and Tract 2 of COS 5085 located in
Missoula County, Montana. . ."

24 Dennis likewise replies on Art. IX, Neilson Trust, entitled "Restrictions On
25 Beneficiary's Interest," which states:
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Neither the principal nor the income of any trust created under

1 this Trust shall be liable for the debts of any beneficiary, nor shall the
2 same be subject to seizure by any creditor under any writ or proceeding
3 at law or in equity.

4 Furthermore, no beneficiary shall have the power to sell, assign,
5 transfer, encumber, or in any manner anticipate his or her interest in the
6 trust principal or income, or be permitted to appoint any agent or
7 attorney-in-fact to receive or collect any trust principal or income.

8 The Berlins respond to Dennis' claims by alleging the Berlins are *bona*
9 *fide* encumbrancers, as a matter of law and the public record, because their
10 encumbrance against the property was made in good faith and for valuable
11 consideration pursuant to Montana's Transfer of Real Property statutes at
12 MCA § 70-20-101 *et seq.* In particular, MCA § 70-20-303 states:

13 Every grant of an estate in real property is conclusive against the
14 grantor, also against every one subsequently claiming under him,
15 except a purchaser or encumbrancer who in good faith and for a
16 valuable consideration acquires a title or lien by an instrument that is
17 first duly recorded.

18 Further, MCA § 70-20-404 provides:

19 The rights of a purchaser or encumbrancer in good faith and for value
20 are not to be impaired by any of the foregoing provisions of this part.

21 Benson v. Diehl, 228 Mont. 199, 745 P.2d 315.

22 Dennis counters that the mortgage was made with the Magnolia
23 defendants' intent to defraud him of his inheritance and therefore the Berlins'
24 mortgage is void as a matter of law under MCA § 70-20-401, which provides:

25 Every instrument, other than a will, affecting an estate in real property,
26 including every charge upon real property or upon its rents or profits,
made with intent to defraud prior or subsequent purchasers thereof or

1 encumbrancers thereon is void as against every purchaser or
2 encumbrancer for value of the same property or the rents or profits
3 thereof.

4 However, MCA § 70-20-402 provides:

5 No instrument is to be avoided under 70-20-401 in favor of a
6 subsequent purchaser or encumbrancer having notice thereof at the
7 time his purchase was made or his lien acquired unless the person in
8 whose favor the instrument was made was a privy to the fraud intended.

9 The Berlins' promissory note and mortgage contain no language which
10 would have placed the Berlins on notice as a matter of public record that
11 Barbara and her husband, Colbert, did not have full legal title to the subject
12 property at the time of execution of the promissory note and mortgage.
13 Nevertheless, Dennis insists the Berlins must have had actual or constructive
14 knowledge of the existence of the family trust and failed to read the trust
15 documents to its own detriment. Dennis' sole basis for the argument that the
16 Berlins must have had knowledge of the trust is the fact that the Berlins
17 named both him and the family trust as defendants in this foreclosure action.
18 While naming the family trust and Dennis as party defendants in the present
19 foreclosure action reflects Berlins' knowledge of the possible existence of
20 those parties' legal claims to the property at the time the Berlins filed this
21 foreclosure action, it has no material evidentiary value in determining whether
22 Berlins knew of and should have read the terms of the family trust when
23 Berlins entered into the promissory note and mortgage with the Magnolia
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defendants, much less that the Berlins were "privy to the fraud intended."

1 In the absence of genuine material evidence of Berlins' actual or
2 constructive notice of Dennis' property interests in the family trust in March of
3 2007 when the Berlins' mortgage was executed, Berlins argue Dennis is
4 merely speculating in an attempt to raise a material question of fact disputing
5 the truthfulness of Berlins' claims that they were and are *bona fide*
6 encumbrancers for value. As such, the Berlins would be innocent third
7 parties under the law quoted herein above, and could not be held liable for
8 any of the claims between Neilson and the Magnolia defendants. The
9 Berlins' mortgage would have legal superiority over Dennis Neilson's claims
10 arising out of the family trust and would be entitled to foreclosure of the
11 mortgage, public sale of the property, and a deficiency judgment to satisfy its
12 claims against the property and the Magnolia defendants.
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17 The Berlins further argue that even if they knew Barbara was acting in
18 the capacity of a trustee, they had the right to rely on Barbara's purported
19 authority to mortgage the property pursuant to MCA § 70-21-307, which
20 states:
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23 Any conveyance of real property hereafter placed of record in any office
24 of any county clerk and recorder in which the name of the grantee is
25 followed by the word "trustee", "as trustee", or some similar fiduciary
26 term and in which no terms and conditions of such purported trust or
any limitation on the power of the grantee to convey shall be set forth so
that any person dealing with such real property could learn therefrom
what, if any, limitation exists upon the authority of the grantee with

1 regard to the reconveyance or encumbrance of such property shall be
2 considered as though such property had been conveyed to such
3 grantee without any limitation upon his authority to reconvey or
4 encumber as fully as the word "trustee", "as trustee", or any equivalent
5 fiduciary expression had not been used in connection with his name,
6 and the use of the word "trustee" or "as trustee" or any equivalent
7 fiduciary expression purporting a trust contained in such conveyance
8 shall have no force or effect in charging any purchaser or
9 encumbrancer thereof with notice of any limitation of power on the part
10 of the person so named as trustee to deal with such lands as his own.

11 The conveying documents contain no terms or limitations on Barbara's
12 powers to convey or encumber the property, and pursuant to this statutory
13 provision, the Berlins are not charged, as a matter of law, with notice of any
14 limitation of Barbara's power to convey or encumber the property.

15 Moreover, there was nothing in the public record prior to recording of
16 the Berlins' mortgage in the office of the Clerk and Recorder of Missoula
17 County, Montana on March 8, 2007 which would have constituted notice of
18 Dennis' claims against the property, since Dennis did not record his Lis
19 Pendens on the property until December 17, 2007. Dennis has failed to
20 come forward with any factual evidence that would have placed Berlins on
21 actual or constructive notice of the existence of the family trust or Dennis'
22 claim on the property prior to December 17, 2007. In the absence of such
23 evidence, the Berlins are entitled as a matter of law to foreclose on the
24 property pursuant to the terms of the promissory note and mortgage.

25 Therefore, IT IS HEREBY ORDERED that:
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- (1) Plaintiffs' Motion for Summary Judgment seeking foreclosure of their Mortgage is GRANTED; and,
- (2) Plaintiffs shall draft and present to the Court the legal documents necessary to effectuate the foreclosure process under the terms of the promissory note, mortgage, and relevant statutory and procedural requirements.

SO ORDERED and DATED this 5 day of October, 2009.


ED MCLEAN, District Judge

cc: Brian J. Smith, Esq.
William K. VanCanagan, Esq.
David H. Bjornson, Esq.